Nos. 02-1734, 02-1755, and 02-1756

Supreme Court, U.S.
FILED
JUN 3 - 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

AMERICAN CIVIL LIBERTIES UNION,
Appellant,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

CHAMBER OF COMMERCE OF THE UNITED STATES, *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION, *et al.*,
Appellees.

On Appeals from the United States District Court
for the District of Columbia

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

ROGER M. WITTEN
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Additional Counsel Listed On Inside Cover

BURT NEUBORNE
FREDERICK A.O. SCHWARZ, JR.
BRENNAN CENTER FOR JUSTICE
161 Avenue of the Americas, 12th Floor
New York, NY 10013

CHARLES G. CURTIS, JR.
DAVID J. HARTH
MICHELLE M. UMBERGER
HELLER EHRMAN WHITE & MCAULIFFE LLP
One East Main Street, Suite 201
Madison, WI 53703

BRADLEY S. PHILLIPS
MUNGER, TOLLES & OLSON LLP
355 South Grand Ave.
35th Floor
Los Angeles, CA 90071

E. JOSHUA ROSENKRANZ
HELLER EHRMAN WHITE & MCAULIFFE LLP
120 West 45th Street
New York, NY 10036

ALAN B. MORRISON
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009

MICHAEL D. LEFFEL
A. KRISAN PATTERSON
JENNIFER L. MUELLER
STACY E. BECK
JERROD C. PATTERSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037

FRED WERTHEIMER
ALEXANDRA EDSALL
DEMOCRACY 21
1825 Eye Street, N.W.
Suite 400
Washington, D.C. 20006

TREVOR POTTER
GLEN M. SHOR
CAMPAIGN LEGAL CENTER
1101 Connecticut Ave., NW
Suite 330
Washington, D.C. 20036

QUESTIONS PRESENTED

1. Whether the Court should summarily dispose of appellants' constitutional challenges to Sections 214(a), 214(b), and 214(c) of the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81, because those challenges are plainly nonjusticiable or insubstantial under settled law.

2. Whether, in other respects, the Court should note probable jurisdiction over appellants' constitutional challenges to BCRA, and set the appeals on those issues for briefing and oral argument.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

ARGUMENT 1

I. THE AFL-CIO AND CHAMBER APPELLANTS FAIL TO RAISE SUBSTANTIAL QUESTIONS WITH RESPECT TO BCRA SECTION 214(a) 1

II. THE ACLU AND CHAMBER APPELLANTS FAIL TO RAISE JUSTICIABLE OR SUBSTANTIAL QUESTIONS WITH RESPECT TO THE COORDINATION RULEMAKING PROVISIONS OF BCRA SECTION 214(b)-(c) 2

CONCLUSION 5

TABLE OF AUTHORITIES

CASES

Page(s)

Buckley v. *Valeo*, 424 U.S. 1 (1976) (per curiam) 2, 5
Colorado Republican Federal Campaign Committee v. *FEC*, 518 U.S. 604 (1996) 5
FEC v. *Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999) 5
FEC v. *Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) 2, 5

CONSTITUTIONAL AND STATUTORY PROVISIONS

2 U.S.C. § 441a(a)(7)(B)(i) 5
Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 1
§ 214(a) 1, 2
§ 214(b) 2, 3, 5
§ 214(c) 2, 3, 4
§ 403(a) 3
Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 ..... 1, 2, 5

REGULATIONS

11 C.F.R. § 100.23 (2002) 5
11 C.F.R. § 109.21 ..... 3, 5

LEGISLATIVE MATERIALS

148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) 3, 4

INTERVENOR-APPELLEES' RESPONSE TO JURISDICTIONAL STATEMENTS

Although intervenor-appellees take issue with the positions taken on the merits by the American Civil Liberties Union (ACLU), the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), *et al.*, and the Chamber of Commerce of the United States (Chamber), *et al.*, in their jurisdictional statements, we agree that many of the questions presented in their jurisdictional statements warrant plenary consideration by this Court. Some of the questions presented in these jurisdictional statements, however, do not warrant plenary consideration by this Court, because they are clearly nonjusticiable under well-settled principles of constitutional and administrative law, or are otherwise so insubstantial as not to justify further briefing and argument. As we have shown in our prior responses to other jurisdictional statements filed in these cases, it is entirely appropriate for the Court to summarily dispose of appeals by dismissal or affirmance, insofar as they seek to raise issues that are nonjusticiable or insubstantial. Such summary dispositions would focus the briefing in this Court on those issues that do warrant the Court's plenary consideration, and would promote the orderly and expedited resolution of the various pending challenges to the Bipartisan Campaign Reform Act of 2002 (BCRA), Pub. L. No. 107-155, 116 Stat. 81.

ARGUMENT

I. THE AFL-CIO AND CHAMBER APPELLANTS FAIL TO RAISE SUBSTANTIAL QUESTIONS WITH RESPECT TO BCRA SECTION 214(a)

Like the McConnell appellants, the AFL-CIO and Chamber appellants challenge BCRA Section 214(a), which extends the Federal Election Campaign Act's (FECA) longstanding regulation of coordination with candidates and candidate committees to include coordination with any "national, State, or local committee of a political party" as well. *See* AFL-CIO J.S. Question Presented 2 and pp. 7-8,

14-18; Chamber J.S. Question Presented 2 and pp. 2, 12, 25. As we have explained in our response to the McConnell jurisdictional statement (at 12-13), that challenge is plainly insubstantial. In Section 214(a), Congress simply took the same definition that has governed expenditures coordinated with political candidates for more than 25 years, and applied it to coordination with parties. Congress did so to prevent circumvention of FECA's contribution limits, a necessity long recognized by both this Court and Congress.[1] Congress has found that, to enforce those contribution limits effectively, it is necessary to apply the coordination regulations to coordination with both candidates and parties. There is no basis in law or the record to set aside this congressional judgment. As the district court majority emphasized, appellants "have provided no explanation as to why the application of this coordination formula to the context of political parties chills political speech any more than when applied to expenditures coordinated with political candidates." Supplemental Appendix to Jurisdictional Statement (JSSA) 137sa (per curiam).[2]

II. THE ACLU AND CHAMBER APPELLANTS FAIL TO RAISE JUSTICIABLE OR SUBSTANTIAL QUESTIONS WITH RESPECT TO THE COORDINATION RULEMAKING PROVISIONS OF BCRA SECTION 214(b)-(c)

Like the McConnell and RNC appellants, the ACLU and Chamber appellants challenge the coordination rulemaking provisions of BCRA Section 214(b)-(c). *See* ACLU J.S. Question Presented 2 and pp. 23-24; Chamber

---

[1] *See FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 447, 464 (2001); *Buckley* v. *Valeo*, 424 U.S. 1, 46-47 & n.53, 78 (1976) (per curiam); 2 U.S.C. § 441a(a)(7)(B)(i).

[2] The AFL-CIO now seeks to supply this missing explanation by reasoning that the coordination formula was tolerable so long as it was limited to agreements and formal collaborations, but that once Section 214(c) was enacted, *all* rules dealing with coordination were rendered unconstitutional. *See* AFL-CIO J.S. 14 n.5, 15-16. This is not an argument against Section 214(a), but against Section 214(c). There are no substantial constitutional issues with respect to Section 214(a) itself.

J.S. Question Presented 2 and pp. 20-31. As we have explained in our response to the McConnell jurisdictional statement (at 7-12), these challenges to Section 214(b)-(c) fail under well-established principles of justiciability and subject-matter jurisdiction. There is no basis for a facial challenge to Sections 214(b) and (c), for those provisions merely repeal the Federal Election Commission's (FEC) prior rules on coordination and direct the FEC to promulgate new rules that "shall address" certain factors. Further, the special jurisdiction that Congress vested in the three-judge district court to entertain constitutional challenges to BCRA does not reach constitutional or statutory challenges to the FEC's new coordination regulations. Thus, if appellants are dissatisfied with the new rules on coordination, they must challenge those rules in an action for judicial review under the Administrative Procedure Act (APA), in which they may raise both constitutional and statutory challenges to the rules. The district court was therefore clearly correct in holding these claims to be nonjusticiable and beyond the subject-matter jurisdiction of the special three-judge district court conferred by BCRA Section 403(a). *See* JSSA 134-56sa (per curiam).

The ACLU maintains that its routine legislative activities on issues will somehow be jeopardized under the coordination provisions of BCRA, even though the ACLU "does not, and never has, coordinated its activities with elected officials for the purpose of influencing elections." ACLU J.S. 14. As we explain in our response to the McConnell jurisdictional statement (at 12 n.15), however, the new FEC rules contain an express safe harbor for legislative activity and lobbying. 11 C.F.R. § 109.21(f). That safe harbor is consistent with clear congressional intent not to reach routine legislative and lobbying activities, but rather to reach only campaign communications. *See* 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain). As the district court majority concluded, appellants' claim that their lobbying activities are imperiled is therefore

speculative at best, and are insufficient to meet Article III standing requirements. JSSA 147sa n.95 (per curiam).

The ACLU also contends that Section 214(c) "broadly deems any 'substantial discussion' about public communication between a candidate and an issue group as a basis for a finding of 'coordination,' " and maintains that a "substantial discussion" standard will act "as a continuing prior restraint which bars the ACLU from engaging in core First Amendment speech for [a] lawmaker's entire term of office." ACLU J.S. 23-24. That reading of Section 214(c) however, is plainly incorrect. Section 214(c)(4) merely provides that the new regulations to be promulgated by the FEC "shall address" the subject of "payments for communications made by a person after substantial discussion about the communication with a candidate or political party." A congressional instruction that an agency "address" an issue in rulemaking imposes no injury upon anyone. Any argument that the FEC's rules might have exceeded constitutional or statutory bounds on this point may and must be raised in an APA challenge to those rules.

The Chamber appellants argue that Congress's instruction to the FEC, in Section 214(c), that the new coordination rules "shall not require agreement or formal collaboration to establish coordination" is so broad that "[n]o element of agreement, formal or informal, express or implied, can be required" as a condition of finding coordination. Chamber J.S. 26. That argument was correctly rejected by the district court majority. Relying on familiar canons of statutory construction, the majority ruled that the term "agreement," when followed by the phrase "or formal collaboration," means only that the new FEC rules may not require "formal agreements" to establish coordination. JSSA 146-47sa n.94 (per curiam). That reading is faithful to Congress's intent to ensure that the new rules would reach "*de facto* and *informal* coordination"

as well as formal arrangements. *Id.*[3] Section 214(c) is thus entirely consistent with this Court's recognition that coordination includes "general . . . understanding[s]" and "wink or nod" arrangements. *Colorado Republican Fed. Campaign Comm.* v. *FEC*, 518 U.S. 604, 614 (1996) (plurality opinion); *see FEC* v. *Colorado Republican Fed. Campaign Comm.*, 533 U.S. 431, 442 (2001).

The Chamber appellants also seek to broaden these cases to encompass the validity of the FEC's new coordination regulations. Chamber J.S. 14, 26-30. As noted above, any challenge to those rules must be brought before a single-judge district court in an action under the APA. The Chamber's challenge to the rules is also insubstantial on the merits. The principal challenged rule is new 11 C.F.R. § 109.21(d)(1), which, the Chamber complains, "continues to include as 'coordinated' any independent speech 'at the *request or suggestion* of a candidate or an authorized committee, political party committee, or agent.'" Chamber J.S. 30 (emphasis added). In *Buckley* v. *Valeo*, 424 U.S. 1, 47 n.53 (1976) (per curiam), this Court approved a "request or suggestion" standard for coordination reflected in the legislative history of the 1974 FECA amendments, and Congress expressly adopted that standard in 1976 in reliance on *Buckley* (*see* 2 U.S.C. § 441a(a)(7)(B)(i)).[4]

CONCLUSION

The Court should summarily dispose of the ACLU, AFL-CIO, and Chamber appellants' challenges to Sections

---

[3] *See* 148 Cong. Rec. S2145 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (intent is to reach "[i]nformal understandings and de facto arrangements [that] can result in actual coordination as effectively as explicit agreement or formal collaboration"); *id.* (statement of Sen. Feingold) (FEC's prior rule "sets too high a bar" and "would miss many cases of coordination that result from de facto understandings").

[4] That standard was approved again in the *Christian Coalition* district court decision upon which appellants otherwise rely, and indeed was part of the prior FEC rules that appellants are seeking to restore. *See FEC* v. *Christian Coalition*, 52 F. Supp. 2d 45, 91 (D.D.C. 1999); 11 C.F.R. § 100.23(c)(2)(i) (2002), *repealed by* BCRA § 214(b).

214(a), 214(b), and 214(c). In all other respects, the Court should note probable jurisdiction of the appeals in these cases and set the cases for plenary review.

Respectfully submitted,

ROGER M. WITTEN
WILMER, CUTLER & PICKERING
399 Park Avenue
New York, NY 10022

SETH P. WAXMAN
Counsel of Record
RANDOLPH D. MOSS
ERIC J. MOGILNICKI
EDWARD C. DUMONT
PAUL R.Q. WOLFSON
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

JUNE 2003